

UNITED STATES OF AMERICA
SMALL BUSINESS ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
WASHINGTON, D.C.

NAICS APPEAL OF:

SVL Analytical, Inc.

Appellant

Solicitation No. PR-HQ-04-12263

Environment Protection Agency

Washington, DC

Docket No. NAICS-2005-07-13-36

Decided: August 4, 2005

APPEARANCE

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for Appellant

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for the Environmental Protection Agency

DIGEST

A procurement for an Environmental Services Assistance Team (ESAT) is appropriately classified under North American Industry Classification System (NAICS) code 541380, Testing Laboratories.

DECISION

HOLLEMAN, Administrative Judge:

Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

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Issue

Whether a procurement for an Environmental Services Assistance Team (ESAT) is appropriately classified under NAICS code 562910, Environmental Remediation Services, or NAICS code 541380, Testing Laboratories.

I. BACKGROUND

A. Procedural Background

On July 5, 2005, the U.S. Environmental Protection Agency, at Washington, D.C. (EPA) issued the subject Request for Proposals (RFP), seeking to procure an Environmental Services Assistance Team (ESAT) for Region 1. The procurement is totally set aside for small business. The Contracting Officer (CO) designated North American Industry Classification System (NAICS) code 562910, Environmental Remediation Services, with a corresponding 500 employee size standard, as the appropriate NAICS code for this procurement. Initial offers are due on August 5, 2005.

On July 13, 2005, SVL Analytical, Inc. (Appellant) filed the instant appeal. Appellant asserted that the appropriate NAICS code for this procurement is code 541380, Testing Laboratories, with a corresponding \$10 million annual receipts size standard.

On July 27, 2005, EPA responded to the appeal, defending its NAICS code designation.

B. The Performance Work Statement

The Performance Work Statement (PWS) requires the contractor to provide technical, analytical and Quality Assurance (QA) support to EPA, and other state and Federal agencies, and tribal organizations to facilitate identification, assessment, regulation and remediation of environmental hazards. EPA will require these analytical services in support of its hazardous waste site projects and environmental monitoring. The contractor will provide analytical chemistry, biological and field sampling plus analytical support to EPA at its regional laboratories and specified field locations. The PWS calls for the contractor to perform five tasks as follows.

1. Analytical Support

The contractor will analyze environmental samples consisting of a wide variety of media for organic and inorganic chemical contaminants. The contractor will also create and maintain log books and other records of the analysis in accordance with good laboratory practices.

The contractor will also perform biological testing on hazardous waste, water, soil, sediments, tissue, vegetation and other media, and will conduct biological sampling and perform biological assessments. The contractor will collect the media and organisms for examination, develop and implement a site work plan, and prepare and maintain laboratory log books and other necessary records. The contractor will also provide routine maintenance and recalibration of laboratory instruments.

The contractor will provide staff to operate and maintain one or more mobile analytical laboratories. The contractor will design and implement the analytical plans for the decision needs of a specific field analytical product, and develop a site work plan. The contractor will also provide field sampling support. The contractor will prepare, analyze and collect air filters in order to perform quantitative gravimetric analyses of the air at given sites.

The contractor will provide support for the operation of a Field Warehouse. The contractor is responsible for cleaning, maintenance, custodial duties and recordkeeping in the laboratories.

The contractor will also submit the data obtained from the analysis to EPA.

2. Data Review

The contractor will perform technical review of the analytical data to assess data quality and completeness. The contractor will perform electronic validation of the data, and produce reports summarizing statistical information concerning the data review.

3. Analytical Logistical Support

The contractor will provide analytical logistical support to activities EPA will identify in task orders. It will coordinate tracking the flow of analytical data and documents. The contractor will also manage, track, and maintain sample and QA related data. The contractor will generate and distribute chain-of-custody, traffic report forms and sample tags. The contractor will also track the status of samples from the time they are received, and will archive and track the data received.

4. Quality Assurance/ Quality Control Support

The contractor will prepare and review biological and human health data and assessments, including ecological risk assessments, biodiversity assessments, human health risk assessments, and endangered species assessments. The contractor will also prepare and review QA project plans, sampling and analysis plans, and other QA related documents. In addition, the contractor will perform data reviews for the regional data validation oversight program, and provide technical support to EPA in its review of laboratory performance.

5. Other Task-Related Activities

The contractor will provide training to EPA and other federal and state governmental agencies in data review protocols and QA guidance and processes, and shall attend conferences in order to support the assignments in this contract.

C. The Appeal

Appellant asserts it is an interested party because the size standard selected by the CO forces it to compete against larger businesses for this award.

Appellant argues that the principal purpose of this procurement is really laboratory testing, not environmental remediation. Appellant asserts EPA's sources sought announcement was defective because it informed prospective offerors of two potential size standards, and thus EPA was not aware of the field of potential competitors.

Appellant argues that 541380 best describes the nature of the services being acquired. Appellant asserts the great majority of the tasks in the PWS describe testing laboratory activities, rather than environmental remediation. Testing laboratory activities constitute well over 50% of the anticipated workload and value of the contract.

Appellant also asserts that the use of NAICS code 541380 is consistent with EPA's other planned procurements in this field, and inconsistent with its approach elsewhere. EPA's other planned procurements using NAICS code 562910 involve activities such as remedial investigations, feasibility studies, and remedial design, construction and oversight at current and former federal facilities. In contrast, Appellant asserts, the instant procurement is clearly for laboratory testing and not for remediation services.

Finally, Appellant asserts the limitations in the Small Business Administrations (SBA) size regulations on the use of NAICS code 562910 make it unsuitable for this procurement. Analytical testing and related work constitute far more than 50% of the expected work in this solicitation. Appellant argues that this makes this procurement ineligible for designation under code 562910, citing 13 C.F.R. § 121.210, fn. 14(b). Further, the work required here does not require activities from three or more separate NAICS codes.

D. The EPA's Response

EPA asserts Appellant has not been adversely affected and does not have standing to pursue this appeal. EPA asserts that whether any businesses larger than Appellant will respond to this solicitation is unknown, and thus any adverse affect is speculative at this point.

EPA argues that NAICS code 562910 is correct because, although the services do not include remedial actions, they do directly support the cleanup and restoration of abandoned

hazardous waste sites under EPA's Superfund program. The procurement requires a number of services, "all of which are testing, and therefore included within SBA's footnote 14(b) to NAICS 562910." Further, the Data Validation and Quality Assurance tasks of the procurement fall outside NAICS code 541380. EPA estimates these activities comprise 40% of the work here. In contrast, all the activities here support remediation activities, so NAICS code 562910 is appropriate.

EPA also disputes Appellant's characterization of this NAICS code designation as inconsistent with other EPA procurements. EPA asserts it has used NAICS code 562910 and its predecessor, Standard Industrial Classification (SIC) code 8744, for other ESAT procurements. Further, Appellant has incorrectly cited one procurement as being conducted under NAICS code 543180, when it in fact was designated 451330, Professional Engineering Services.

EPA further asserts that a redesignation to NAICS code 543180 would result in a full and open competition rather than a small business set aside, because EPA has no reasonable expectation that there will be offers from at least two responsible concerns under that NAICS code.

II. DISCUSSION

Appellant filed the instant appeal within 10 days after the EPA issued the solicitation. Thus, the appeal is timely. *NAICS Appeal of IT Research Corporation*, SBA No. NAICS-4499, at 5 (2002); 13 C.F.R. § 134.304(a)(3).

This Office has held that a concern which is small under the size standard challenged in a NAICS code appeal has standing to file an appeal advocating a lower size standard, because it is adversely affected by having to compete with larger firms. *SIC Appeal of Challenger Engineering, Inc.*, SBA No. SIC-3728, at 6-7 (1993).¹ Accordingly, Appellant has standing to file this appeal.

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove the CO's NAICS code designation is based on a clear error of fact or law. *NAICS Appeal of Durodyne, Inc.*, SBA No. NAICS-4536, at 4 (2003); 13 C.F.R. § 134.314. The correct NAICS code is that which best describes the principal purpose of the services being procured, in light of the industry description in the *NAICS Manual*,² the description in the solicitation, and the relative weight of each element in the solicitation. *Durodyne*, SBA No. NAICS-4536, at 4; 13 C.F.R. § 121.402(b).

¹ Case precedent of this Office decided under the prior Standard Industrial Classification (SIC) code system is applicable to NAICS code appeals. *NAICS Appeal of Phoenix Scientific Corporation*, SBA No. NAICS-4416, at 8 (2000).

² Executive Office of the President, Office of Management and Budget, *North American Industry Classification System Manual* (2002).

The NAICS code selected by the CO, 562910, covers:

[E]stablishments primarily engaged in one or more of the following:

- (1) remediation and cleanup of contaminated buildings, mine sites, soil, or ground water;
- (2) integrated mine reclamation activities, including demolition, soil remediation, waste water treatment, hazardous material removal, contouring land, and revegetation;
- (3) asbestos, lead paint, and other toxic material abatement.

NAICS Manual, at 790.

Some NAICS codes are further defined in SBA's size regulations, which provide additional criteria for classifying procurements under those NAICS codes. *NAICS Appeal of Prudent Technologies, Inc.*, SBA No. NAICS-4710 (2005). Under these regulations, a procurement must meet two tests before it may be classified under NAICS code 562910. First, the purpose of the procurement must be to restore a contaminated environment. Second, the procurement must be composed of activities in three or more separate industries identified with separate NAICS codes, none of which constitutes 50% or more of the contract's value. *Prudent Technologies*, SBA No. NAICS-4710, at 5-7; *SIC Appeal of CMC Construction Co., Inc.*, SBA No. SIC-4154 (1996)³; 13 C.F.R. § 121.201, fn. 14(b). The purpose of this NAICS code designation is to cover procurements which require multiple activities associated with restoring a contaminated environment, as distinguished from environmentally related procurements associated with a particular industry. *CMC Construction Co., Inc.*, SBA No. SIC-4154, citing 59 Fed. Reg. 47236-7 (September 15, 1994). Simply put, there is a high threshold a CO must meet before designating NAICS code 562910 for a procurement.

Here, while this procurement is in support of restoration of contaminated sites, such restoration is not the purpose of the procurement. Rather, this procurement is to obtain ESAT teams which will collect samples, perform analysis upon them, review and track the data, prepare and review quality assurance project plans, and provide logistical support to other testing and analysis activities by EPA. The procurement involves the testing of sites, the logistical effort needed to support that testing, and taking a number of steps to ensure that the data gathered, analyzed, and retained will be accurate. This is not remediation, but testing and analysis.

Further, there is no requirement for the construction, engineering, architectural, trucking, management, or sanitary services of the type the regulations contemplate will be included in a procurement under NAICS code 562910. 13 C.F.R. § 121.201, fn. 14(b). The fact that the services required here are included in footnote 14(b), as EPA notes, is not enough. For the

³ This case analyzed the predecessor SIC code 8744 for Environmental Remediation Services.

designation of 562910 to be correct, the services required by procurement must also cover at least three NAICS codes, and the procurement must have as its purpose the remediation of environmentally damaged sites. *Prudent Technologies*, SBA No. NAICS-4710, at 5-7.

The instant procurement thus clearly fails both tests for designation under 562910. That is, it is not for the remediation of contaminated sites, but for testing on those sites, and it does not require services from three different NAICS codes.

The NAICS code advocated by Appellant, 541380, Testing Laboratories, covers:

[E]stablishments primarily engaged in performing physical, chemical, and other analytical testing services, such as ... biological testing (except medical and veterinary), ... geotechnical testing, ... or thermal testing. The testing may occur in a laboratory or on-site.

NAICS Manual, at 734.

This NAICS code's predecessor, SIC code 8734, Testing Laboratories, was found to be appropriate for procurements for technical and industrial hygiene support, which involved surveys of environmentally hazardous asbestos (*SIC Appeal of Apex Environmental, Inc.*, SBA No. SIC-3851 (1993)); the management and operation of an oil analysis laboratory (*SIC Appeal of Tri-Tessco, Inc.*, SBA No. SIC-3331 (1990)); and the testing of chemical and urine samples, which involved not just testing, but also included evaluative, judgmental, and analytical requirements (*SIC Appeal of Sitek Research Laboratories, et al.*, SBA No. SIC-3228 (1989)). In other words, this NAICS code encompasses not merely all types of scientific testing, but the administrative duties that accompany it, such as the logistical and QA work, and data analysis and tracking required by the instant RFP.

The fact that EPA has classified other, similar procurements under NAICS code 562910 cannot be determinative here. The evidence of other, similar procurements not reviewed by this Office cannot override this RFP's failure to meet the explicit regulatory criteria for the NAICS code selected by the CO. *NAICS Appeal of Eagle Design and Management, Inc.*, SBA No. NAICS-4521, at 5-6 (2002). Similarly, EPA's prediction that this procurement will be changed to full and open competition cannot dictate this Office's decision, in light of its failure to meet the regulatory criteria.

Appellant has met its burden in this appeal. The Administrative Judge finds that the CO's NAICS designation is clearly erroneous as a matter of fact and law. The Administrative Judge specifically finds that the CO's use of the 562910 code ignores the purpose of this procurement. That is, the PWS of this procurement was for testing, not hands on remediation, reclamation, demolition, or abatement. Thus, the instant procurement does not have as its primary purpose environmental remediation, and does not include work from three different NAICS codes. Therefore, it cannot be designated under NAICS code 562910, Environmental Remediation.

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Rather, EPA's RFP seeks to procure scientific testing services, and thus is properly classified under NAICS code 543180, Testing Laboratories.

III. CONCLUSION

The appropriate NAICS code for this procurement is 543180, Testing Laboratories, with a corresponding \$10 million annual receipts size standard. The Contracting Officer's designation is REVERSED, and the instant appeal is GRANTED.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(b).

CHRISTOPHER HOLLEMAN
Administrative Judge